

Paper No. 13
GFR/gr

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 27, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re S.O.S. Corporation

Serial No. 75/172,478

Harold J. Milstein of Wilson Sonsini Goodrich & Rosati for
S.O.S. Corporation

Gary R. Thayer, Trademark Examining Attorney, Law Office
103 (Michael Szoke, Managing Attorney)

Before Walters, Wendel and Rogers, Administrative Trademark
Judges.

Opinion by Rogers, Administrative Trademark Judge:

The S.O.S. Corporation has filed an application to register the mark HYDRAWEB for "computer software, routers, and multiplexors that serve to redirect HTTP calls to heterogeneous web servers."¹ The Trademark Examining Attorney made final a refusal of registration under Section

Ser No. 75/172,478

2(d) of the Trademark Act, 15 U.S.C. 1052(d). The basis for the refusal is that the mark HYDRA has already been registered for an "interface between a number of terminals and a computer,"² so that when applicant's mark is used on or in connection with the identified goods, it would be likely to cause confusion or mistake, or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We reverse the refusal to register.

Our determination under Section 2(d) is based on analysis of all of the probative facts in evidence that are relevant to factors bearing on the likelihood of confusion issue. See **In re E.I. du Pont de Nemours and Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of that issue in this case, key considerations are the similarities of the marks and the relatedness of the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We consider, first, the marks.

The Examining Attorney argues that "HYDRA" is a strong mark because, when used for computer software and hardware

¹ Serial No. 75/172,478, in International Class 9, filed September 26, 1996, claiming a bona fide intention to use the mark in commerce.

² Registration No. 1,220,683, issued December 21, 1982, to JDS Microprocessing, Inc.; affidavits under Sections 8 and 15 of the Trademark Act accepted and acknowledged, respectively.

items like those of applicant and registrant, it is arbitrary and applicant has merely added the highly suggestive or descriptive term "WEB" to the registered mark.³

In contrast, applicant contends the marks are sufficiently different because "HYDRA" is a weak mark when used for "computer related products". In support of this argument, applicant points to seven registrations for marks in international class 9. However, applicant's argument is not well taken. The third party registrations on which applicant attempts to rely have not been properly made of record, since applicant has provided only a search service list rather than copies of the registrations. See **In re Hub Distributing, Inc.**, 218 USPQ 284 (TTAB 1983). The Examining Attorney did not discuss the registrations or

³ We take judicial notice of the following dictionary definition, which illustrates that "Web," in the context in which it is used by applicant, is a shorthand reference for the "World Wide Web."

Web See *World Wide Web*.

The Computer Glossary The Complete Illustrated Dictionary 462 (8th ed. 1998)

World Wide Web The largest collection of online information in the World. The Web is an Internet facility that has become synonymous with the Internet [sic]. Its foundation is the HTML document, which contains links (URLs) to other documents on the same Web server or on servers anywhere in the world. The Web uses the HTTP protocol to download Web pages to a browser...

...[T]he Web is turning into "the" worldwide information system for education, research, entertainment and commerce.

The Computer Glossary The Complete Illustrated Dictionary 470 (8th ed. 1998)

otherwise treat them as being of record. Thus, they have not been considered as evidence.⁴ Even if the registrations had properly been made of record, it is well settled that they would not stand as evidence that any of the marks are in use in commerce or that purchasers are conditioned to distinguish between the marks by focusing on components other than the shared element. **AMF Inc. v. American Leisure Products, Inc.**, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). Moreover, we note that one of the seven registrations has been cancelled for failure to file an affidavit of use under Section 8 of the Trademark Act, that two others are for dissimilar marks (e.g. FIBERHYDRANT and VIRTUAL HYDRAULICS), and that three others are for marks used for computer application programs apparently entirely unrelated to the goods involved in this case.

We agree with the Examining Attorney's argument that, in relation to applicant's goods, the term "WEB" is highly suggestive and weak, if not descriptive; and applicant does not contend otherwise. We find that "HYDRA" is the

⁴ In its response to the initial Office action refusing registration, applicant referenced two of the seven registrations, by mark and registration number. Then, in requesting reconsideration of the final refusal, applicant attached a list of all seven registrations. Rather than ignore applicant's proffers of evidence, the better practice would have been for the Examining Attorney to expressly notify applicant of

dominant portion of applicant's mark, and is identical to registrant's mark.

The test, when comparing the involved marks, is not whether applicant's mark can be distinguished from registrant's marks when subjected to a side-by-side comparison but, rather, whether the marks are sufficiently similar in terms of their overall commercial impression that confusion is likely to result as to the source or sponsorship of the goods offered under the respective marks. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See **Sealed Air Corp. v. Scott Paper Co.**, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In their entirety, we find the marks are similar in sound and appearance and are likely to create substantially

the deficiencies therein, so that applicant could have timely submitted the evidence in the proper form.

similar commercial impressions in the minds of prospective purchasers.

We turn our analysis, then, to the relatedness of the involved goods. To begin, we reject the Examining Attorney's argument that the involved products must be considered related because they are "used for communications interface [or what is known in the trade as 'connectivity'] purposes in a computer network." The involved products are not related in the context of a likelihood of confusion analysis merely because they perform a similar function, if that function is performed in relation to unrelated goods. The likelihood of confusion analysis requires a more detailed examination of the nature of the products and the context in which they are used. Even if the respective goods are not similar or competitive, there may still be a likelihood of confusion, when similar marks are used, if such goods are related in some manner and/or if the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under conditions that would give rise to the mistaken belief that the goods emanate from or are in some way associated with the same source or sponsor. See **In re Kangaroos U.S.A.**, 223 USPQ 1025, 1026-1027 (TTAB 1984), and cases cited therein.

Applicant has argued that the involved products are "highly technical and sophisticated" and would be purchased with "great care". Applicant also argues that its mark is proposed to be used for a narrowly defined class of goods⁵:

Applicant's products are, in essence, load managers. They are used in connection with very busy Web sites. Since the Web sites are so busy, more than one server (computer) is necessary to handle all of the traffic on the Web site. What applicant's product does is to monitor this Web site traffic, as well as the current capacity of each server. Based upon this information, Applicant's product directs the "traffic" among the various servers to balance the load of work and keep the Web site operating at maximum capacity. Request for Reconsideration, pp. 2-3.

To support its contentions regarding the technical sophistication of its goods and their precise function, applicant introduced excerpts from Internet sources, referred to by applicant as "computer trade journals" which discuss applicant's products. One is the abstract alone from a source entitled "Network World". The other comprises both the abstract and full article from a source entitled "Network Computing."

The Board has treated evidence from the Internet cautiously. See **Raccioppi v. Apogee Inc.**, 47 USPQ2d 1368,

⁵ Though applicant discusses its mark as if the mark is now in use, we note that the involved application is based on intent-to-use and no Allegation of Use has been filed.

1370-71 (TTAB 1998); See also, **In re Total Quality Group Inc.**, 51 USPQ2d 1474, 1476 (TTAB 1999). We do not abandon that approach; but we accept these publications as support for the contentions for which they have been offered. These submissions from applicant tend to establish that applicant's goods are discussed by computer professionals as the technically sophisticated and function-specific goods which applicant claims them to be. Cf. **Raccioppi**, *supra* at 1371-72 (printouts of articles published on the Internet relied upon not to prove truth of statements made in articles but that subjects "fall within the scope of matters discussed by" relevant professionals).

In regard to registrant's goods, applicant asserts that the identification of goods in the cited registration is overly broad and vague, in large part because of the age of the registration and the Office's asserted tendency in the "early days of the computer industry," prior to market segmentation, to accept broad identifications. Nowadays, applicant argues, there is discreet market segmentation in the computer industry, and more particularly, among computer hardware manufacturers.

Applicant asserts that registrant's goods are used solely as an interface between a large mainframe computer and "dumb" terminals. In support of its arguments

regarding the registrant's goods, applicant has made of record information about registrant's products which applicant claims to have downloaded from registrant's website.

It is clear, however, that the issue of likelihood of confusion between marks must be determined on the basis of the goods as they are identified in the respective application and registration. **Canadian Imperial Bank v. Wells Fargo Bank**, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987), and **In re Elbaum**, 211 USPQ 639, 640 (TTAB 1981). *See also*, **In re Linkvest S.A.**, 24 USPQ2d 1716 (TTAB 1992) (Board rejected applicant's argument that purchasers of computer programs "are aware of 'commercial compartmentalization'" and focused on goods as identified in application and registration).

We must consider registrant's goods as broadly as they are identified.⁶ Nonetheless, the Internet information

⁶ In doing so, we take judicial notice of the following definitions of terms in registrant's identification.

computers In the grand scale of the computer chain-of-being, 'micros' are at the bottom, below minicomputer, mainframe, and supercomputer. Personal, laptop, portable, and home computers fall into the 'micro' category...
net.speak the internet dictionary 42 (1994).

terminal (1) An [input/output] device for a computer that usually has a keyboard for input and a video screen or printer for output.

Ser No. 75/172,478

submitted by applicant is useful in understanding the nature of the registrant's identified goods. See **In re Continental Graphics Corp.**, 52 USPQ2d 1374, 1376 (TTAB 1999) (*interpreting In re Trackmobile Inc.*, 15 USPQ2d 1152 (TTAB 1990)) (Board may resort to extrinsic evidence when necessary to determine general nature of vaguely identified goods).

We agree with the Examining Attorney that consideration of the information from registrant's website actually tends to show that registrant's goods identified by the mark HYDRA are broader in scope than applicant argues, yet clearly within the broad scope of registrant's identification of goods. They are not merely interfaces between "dumb" terminals and mainframe computers. Registrant clearly markets interfaces that can be used to connect mainframes, personal computers, and servers, among other items. What is noteworthy, is that there is no indication, on this record, that prospective purchasers of registrant's goods would use them for managing HTTP calls directed to the specific types of computers known as web servers. The Examining Attorney has not presented any evidence that interfaces like those produced by registrant

The Computer Glossary *The Complete Illustrated Dictionary* 396 (7th ed. 1995).

also are used as the web server load managers which applicant proposes to produce; nor has he presented evidence that such goods should be presumed to be marketed to the same class of consumers or in the same channels of trade.⁷

In sum, though we find that the marks are substantially similar, the Examining Attorney has not established a sufficient connection between applicant's and registrant's goods, as identified, for us to find that contemporaneous use of the marks in commerce would be likely to cause confusion as to source or sponsorship.

Decision: The refusal of registration is reversed.

C. E. Walters

H. R. Wendel

G. F. Rogers

Administrative Trademark
Judges, Trademark Trial
and Appeal Board

⁷ We do not foreclose the possibility that, in an inter partes proceeding, different facts could be established.